No. 3794

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

STERLING TIRE CORPORATION (a corporation),
Plaintiff in Error,

vs.

JOHN M. SULLIVAN, as Receiver of an alleged co-partnership consisting of E. E. GERLINGER and G. R. HICKOK and trading under the fictitious name of STERLING TIRE COMPANY OF CALIFORNIA, and E. E. GERLINGER, Intervenor,
Defendants in Error.

BRIEF FOR DEFENDANT IN ERROR, JOHN M. SULLIVAN, AS RECEIVER, JOINED IN BY INTERVENOR, E. E. GERLINGER.

EDGAR D. PEIXOTTO,
Attorney for Defendant in Error, John M. Sullivan, as Receiver.

ROY A. BRONSON,
Attorney for Intervenor, E. E. Gerlinger.

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Facts.

The facts of this case pertinent to the position of defendant in error, who it must be at all times remembered is an arm of the State Court, are briefly as follows:

On May 5th, 1920, one Gerlinger commenced an action in the Superior Court of San Francisco against one Hickok, claiming that the Sterling Tire

Corporation of California was the fictitious name of a co-partnership consisting of himself and Hickok, and that the partnership assets consisted of a certain contract with plaintiff in error, which contract involved and carried with it the possession and right of sale of certain tubes and tires, which tubes and tires are the identical property that are sought to be replevined in the instant case. It was admitted and conceded that these tubes and tires were in the possession of the defendant Hickok by reason of the act and by and with the consent of plaintiff in error. Relief was asked by way of adjustment of the partnership differences and pending litigation, the appointment of a receiver to take possession of the partnership assets and conduct the partnership business. The State Court after due proceedings appointed the defendant in erorr, receiver. There is no doubt that the State Court had jurisdiction to appoint a receiver and that it was an action in which the appointment of a receiver was lawful and proper. The jurisdiction to appoint has never been questioned by any party or person interested in the transaction.

The order appointing the receiver authorized him to take possession of the tires and tubes consigned to the Sterling Tire Company of California by the Sterling Corporation of New Jersey (the plaintiff in error), which tires admittedly were in the possession of the defendant Hickok by order and authority of plaintiff in error (Tr. pages 33-34). The receiver duly qualified and on or about May 10th, 1920, took

possession of the tires and tubes herein involved. Gerlinger, the plaintiff, was represented in the State Court by Mr. Bronson; Hickok, the defendant by Mr. Harron, and the receiver by Mr. Peixotto. A motion was made by Mr. Harron on behalf of the defendant to raise the bond of the receiver to $5000.00 which motion was granted by the Judge of the State Court. A motion was then made to vacate and dismiss the order appointing the receiver; said motion was heard on May 19th and 21st and was denied by the Court on May 21st, 1920 (Tr. page 27). At the hearing of this motion to discharge and vacate the receiver, Mr. Harron stated that he had been authorized to represent the Sterling Tire Corporation (the plaintiff in error) and Mr. Harron read in open Court a telegram from the Sterling Tire Corporation of Rutherford, New Jersey (plaintiff in error) authorizing him to act as their attorney and protect their interests (Tr. bottom page 35 top page 36). This appearance in the State Court by plaintiff in error was without reservation, it was not special, and at such appearance Mr. Harron as attorney representing the Sterling Tire Corporation (plaintiff in error), moved the State Court to order a bond be furnished in favor of the Sterling Tire Corporation, plaintiff in error, stating that property upon which the Sterling Tire Corporation had interests was of great value and the Sterling Tire Corporation wished a bond to protect it against damage. The State Court granted the motion of the Sterling Tire Corporation (plaintiff in error) and ordered plaintiff to give a bond in the sum of $5000 running not

only to the defendant, Hickok, but to the Sterling Tire Corporation, plaintiff in error, who had voluntarily appeared without reservation and moved the Court to grant the giving of this bond for its further protection (Tr. page 36). A surety bond was thereupon furnished and in part reads as follows (Tr. page 37):

> "Now therefore, we the undersigned, in consideration of the premises and the appointment of a receiver herein, do jointly and severally undertake in the sum of $5000 and promise to the effect that in case said receiver shall be appointed that plaintiff will pay to said defendant or Sterling Tire Corporation of Rutherford New Jersey or National Finance Co., a corporation, such damages not exceeding the sum of $5000 which defendant or Sterling Tire Corporation of Rutherford, New Jersey or said National Finance Co. may sustain by reason of the appointment of said receiver and the entry by him upon his duties in case the plaintiff shall have procured such appointment wrongfully."

After the furnishing of this bond for the protection of plaintiff in error upon its appearance and on its motion made by its duly authorized attorney who appeared generally in the action in the State Court by the same, the Court denied the motion to vacate and dismiss the receiver and the motion was never appealed from and the matter of the proceeding of the appointment of the receiver was accepted as final and the receiver continued to act. Upon the receiver's status being thus settled by the Court and there being no appeal therefrom, the receiver gave notice to Mr. Bronson, attorney for plaintiff, and to

Mr. Harron, attorney for defendant (Mr. Harron being the same attorney who had appeared and announced that he was authorized and did represent the Sterling Tire Corporation of Rutherford, New Jersey (plaintiff in error), of notice of motion of receiver for direction and compensation. This notice is set forth in Transcript on pages 38 and 39, and asks for an order directing the course and conduct of the receiver with reference to the mode and manner of carrying on the business and upholding the partnership of the property pendente lite, for compensation to himself and attorney, for such other and further orders as may be necessary for the preservation of the property and the conservation of the rights of all the parties. This motion was heard by the State Court on the 27th day of May, 1920, notice of which as has heretofore been said, was given to Mr. Harron, attorney for Sterling Tire Corporation, plaintiff in error. At the hearing of this motion, Mr. George E. Stoker appeared and stated that he had been retained by the Sterling Tire Corporation and was to be associated with Mr. Howard Harron on behalf of the Sterling Tire Corporation and requested that no order be made respecting the sale or disposition of the tires until he could communicate with the Sterling Tire Corporation and ascertain their wishes and the facts of the case. The matter was heard and argued before the said Court and thereafter an order was prepared by the various attorneys, which order was practically a consent order having been O. Ked and consented to by each one of the attorneys and is set forth in full on pages

40, 41, 42 and 43 of the Transcript. This order was in effect a recognition of the receiver of the State Court of his possession of the property and a request by all of the parties that the receiver hold the possession pending the determination of the Sterling Tire Corporation as to whether or not it should intervene, and in the event that plaintiff in error did not intervene, "then said receiver shall hold all of said automobile tires and tubes intact to abide the further order of this Court". The receiver was further authorized pursuant to the consent order made by the State Court to sell said tires and tubes with the future consent and upon such terms as may be approved by the Sterling Tire Corporation or its authorized agents, and the matter of fixing of fees by the receiver and counsel fees was continued by consent of all parties until the further order of this Court. As previously stated, this order was by the consent of attorneys representing all of the parties, including the Sterling Tire Corporation and this order by its very terms contemplated by consent of all parties the continued possession and functioning of the receiver, and the receiver continued under the authority of this Court to possess, hold, and keep this valuable property for the benefit of all concerned. On the occasions of the appearance of plaintiff in error in the State Court there was never any objection to the jurisdiction of that Court as to the person or property, but on the contrary, plaintiff in error asked and received substantial relief.

This action was commenced on the 11th day of June, 1920, to replevin the property from the possession of the receiver and after the commencement of the action and on the 14th day of June, 1920, the Sterling Tire Corporation of Rutherford, New Jersey, plaintiff in error, procured an order from the State Court permitting it to sue the receiver, the order reading: "Dated this 14th day of June, 1920, as of the 14th day of May, 1920."

The defendant, the receiver, made a motion in the Court below to stay, dismiss and abate the action upon the grounds of lack of jurisdiction in the Federal Court and setting forth the pending matters in the State Court. These proceedings have not been carried into the transcript and we will suggest a diminution of the record in this regard should this Court deem that portion of the record necessary. Thereafter, the defendant in error filed his answer.

The answer denies that plaintiff was entitled to the possession, and alleges the possession of defendant as receiver, setting forth in detail the pendency of the litigation in the State Court. We particularly call this Court's attention to Par. XI of the Answer, Transcript page 15, setting up the claim of the receiver to a lien on the property for his fees. The answer also pleads jurisdiction. The order allowing the receiver's compensation and the order confirming the account of the receiver in which the allowance is made by the State Court for $2676.67, which sums included rental of proper place to store the property as requested by plaintiff

in error and were ordered payable out of the fund or property which came into the hands, possession and control of the receiver under and by virtue of his appointment as such receiver, and that such receiver have a lien on said fund or property for his compensation as set forth on pages 44, 45 and 46 of the Transcript, as also the recognition of the rights of the receiver in the Findings of Fact and Conclusions of Law set forth on page 48 of the Transcript.

Argument.

This is an action in claim and delivery, a successor to the common-law action of replevin. Claim and delivery is a possessory action; it is the lineal descendant of the common-law action of replevin, with the scope of its application greatly enlarged, but the essential object of the action remains the same, namely, to enforce the plaintiff's right to the present possession of chattels, as against a defendant who unlawfully detains them, and to recover their value if possession cannot be had, together with damages for the detention.

Hall v. Susskind, 109 Cal. 203; 41 Pac. 1012.

The issue and sole question in claim and delivery is the right to the possession at the time of the commencement of the action.

Tuohy v. Linder, 144 Cal. 790.

Claim and delivery does not lie where defendant has a lien on personal property dependent upon possession and he is in possession.

Sutton v. Stephan, 101 Cal. 545.

There is no doctrine or rule better known in the Federal practice than the following:

> "The Court which first acquires the lawful jurisdiction of specific property by the seizure thereof, or by the due commencement of a suit from which it appears that it is or will become necessary to a determination of the controversy involved or to the enforcement of the judgment or decree therein for the Court to seize, to charge with a lien, to sell, or to exercise other like dominion over the property, thereby withdraws that property from the jurisdiction of every other court so far as is necessary to accomplish the purpose of the suit, and that Court is entitled to retain such control as is requisite to effectuate its final judgment or decree therein, free from the interference of every other tribunal."

Cases illustrating this rule are undoubtedly familiar to this Court as many of them have been decided by this Court and we will undertake to cite only a certain few cases which clearly illustrate the facts of the instant case:

In McDowell v. McCormick, 121 Fed. 61, at page 65, the Court said:

> "Upon the facts thus appearing, the authorities which control the present controversy uniformly establish the doctrine that the proceedings so commenced in the Circuit Court of La Porte County gave to that Court complete and exclusive jurisdiction of the subject-matter—

> the res in controversy—with unquestionable right of possession through its receiver. (Citing numerous authorities.) The nature of the action established the custodia legis in the Court wherein the proceedings were first instituted; and this irrespective of any actual seizure of the property, or of violation of the restraining order entered in the primary suit."

The Court concluding said:

> "And the effect of the statement in the bill of exceptions that 'the evidence tended to show that the suit brought in said superior court was instituted in bad faith' requires no consideration. The interference with the custodia legis of the circuit court (State Court) violated these canons of the law, and conferred neither possession nor title which can be recognized or enforced in the case at bar."

The case of Louisville Trust Co. v. Knott et al, 130 Fed. 820, is very much in point and answers very distinctly the argument of plaintiff in error, and we particularly call the Court's attention to the statement of the Court on page 826:

> "In harmony with it, and designed to give it full operation, is another rule, which is that whenever in such case a third party claims some interest in the property which has been subjected to the control of the court, he may intervene in the pending case, and become a party thereto, for the protection of his interest, as explained in Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145; Gumbel v. Pitkin, 124 U. S. 143, 5 Sup. Ct. 616, 28 L. Ed. 1128, and numerous other cases of like character decided by the Supreme Court, or if that interest be such that it survives the exercise of the jurisdiction in the pending case, he may stand aloof

and pursue his remedies after the property has been discharged by the Court which has had it under its control. We are not now concerned with suits in personam, in regard to which other reasons may prevail to a different result. The case of Moran v. Sturges, 154 U. S. 256, 14 Sup. Ct. 1019, 38 L. Ed. 981, though at first blush it might seem to the contrary, is not in conflict with the current of modern decisions. In that case the claim of the plaintiff was of a maritime nature, of which the federal court alone had jurisdiction. The State Court did not have power to deal with it. The two Courts were not of concurrent jurisdiction. The plaintiff could not by intervention confer upon the State Court a jurisdiction which it did not by law possess. The authority of the Federal Court was paramount and exclusive.

It does not matter that the plaintiff in the present case was not a party to the case in the State Court, or that by reason of his citizenship he had a constitutional right to bring his suit in the Federal Court. Perhaps he might have maintained it there for the purpose of establishing his claim. He could then go into the State Court which had the control of the assets of his debtor, and secure the recognition of his right thus established. Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867. The presumption must be that such recognition would be given by the state Court, and his lawful rights only accorded to him. It is not even charged in his bill that any one is attempting to defraud the plaintiff, or is proceeding without right, or to the prejudice of any right of the plaintiff; and, on the whole record, we can see no other hindrance to the plaintiff by the suit in the State Court than such as is ordinarily incident to legal proceedings."

As we have heretofore pointed out, plaintiff in error did appear in the State Court and was granted

a bond to indemnify it against any loss and was further granted permission to intervene, and if plaintiff in error stood idly by and neglected to protect its rights it can not be heard to complain in this Court. Furthermore, in answer to the argument of plaintiff in error that any of the orders with reference to the receiver were not participated in by the plaintiff in error, we again call the Court's attention to the fact that every one of the orders recite that the attorney, Howard Harron, who had appeared in the Superior Court for plaintiff in error, was present in Court and participated in each and every one of the orders and proceedings and Mr. Howard Harron as one of the attorneys for plaintiff in error in the complaint filed in the instant case.

Ward v. Foulkrod, 264 Fed. 627. This case fully sets forth the rules and collates the authorities. The foregoing rules are stated, the Court saying on page 631:

> "Thus arises a rule of comity. It is based on infringement of the jurisdiction of one Court by the action of another court, not where conflict has arisen from differences in the two actions, but where dominion of the subject matter has been acquired under one action, or where the two actions are substantially the same, and where the orderly administration of justice and a desire to avoid an unseemly conflict require the Court which last took jurisdiction—though the first to acquire possession of the property—to surrender such possession on appropriate application, to the Court of concurrent jurisdiction which first acquired jurisdiction of the controversy."

Invariably when a conflict of jurisdiction has been called to the attention of the Federal Court, the Federal Court at all times, if it ultimately takes jurisdiction, protects and enforces the orders, liens and judgment with respect to the property of the State Court, which is illustrated by the case of Brown v. Crawford, 254 Federal 146, page 153:

> "But, however this may be, the possession was taken from the state receiver by summary process. This, I am convinced, is not in accord with the suggestion of comity existing between state and national courts, and, if persisted in, would lead to unseemly conflict between such courts respecting the possession of property."

The final order of the Court in this case was the same as the order made by the District Court in the case at bar. On page 154 the Court saying:

> "The property, however, should be at once returned to Felix W. Isherwood, the receiver in the State Court, and order of sale under the decree of foreclosure should be stayed pending action in that court."

In the case of Phillips v. Noel Const. Co., 266 Fed. 603, the Court on page 607 says:

> "The contest is between nonresidents, New York and Maryland Court receivers. The plaintiffs can as effectively assert their claim in the Maryland Court as in the Supreme Court of the District of Columbia. It is true that they complain that if the fund is allowed to go to the defendant receivers they intend 'to apply the proceeds thereof to the payment of the claims of general creditors * * * and to the heavy costs and expenses of their receivership, including large attorney's fees * * * .'"

The following language is very apt in the case:

> "In the final analysis, the record presents, we think, a case for the recognition of the well-established doctrine of comity between courts of foreign jurisdictions. The Maryland Court, we are bound to assume, will do justice to all parties before it."

See, also,

Sterling v. Seattle, 198 Fed. 913.

The foregoing authorities answer the various arguments of plaintiff in error and point out that plaintiff in error had complete protection before the State Court, which is presumed to do its duty the same as the Federal Court is presumed. On authority of Louisville Trust Co. v. Knott, ante, its constitutional right to select the Federal Court as its forum was not interfered with. It could have protected its right by intervention in the State Court which Court gave it that privilege upon its application, and further gave it a bond upon its application, and we most respectfully submit that this Court should under the foregoing rules give protection and verity to the State Court's orders and liens as was done by the judgment of the Honorable Trial Judge.

PLAINTIFF IN ERROR SUBMITTED ITSELF AND ITS PROPERTY TO THE JURISDICTION OF THE STATE COURT, AND IS BOUND BY ITS ORDERS AND THE LIEN DECLARED THEREON BY THE STATE COURT.

Plaintiff in error's appearance in the State Court both upon the occasion of the asking and receiving

from the State Court a bond to indemnify it and at the time of its asking for leave to intervene upon the motion of the receiver and the making of the order of May 20th, subjected plaintiff in error and its property to the jurisdiction of the Court and it was the duty of the plaintiff in error to have followed that litigation and to seek full protection of its rights in the State Court. It is no answer to say that its appearance upon the matter of May 28th was special.

> "On general principles a statement that a defendant or party makes a special appearance, is of no consequence whatever. If he appears and objects only to the consideration of the case or to any procedure in it because the Court has not acquired jurisdiction of the person of the defendant, the appearance is special and no statement to that effect in the notice or motion is required or could have any effect if made. On the other hand, if he appears and asks for any relief which could only be given to a party in a pending case or *which itself would be a regular proceeding in the case,* it is a general appearance. No matter how carefully or expressly it may be stated that the appearance is special, it is the character of the relief asked and not the intention of the party that it shall or shall not constitute a general appearance which is material." (See 2 Ency. of Pl. & Pr. 625, notes and cases cited.)
>
> Ex parte Clark, 125 Cal. 389-392.

> "It has been uniformly so held, as logically it could not otherwise be held, and, furthermore, that where a party appears and asks for such relief, although expressly characterizing his appearance as special and for the special purpose of objecting to the jurisdiction of the

> Court over his person, he as effectually submits himself to the jurisdiction of the Court as though he had legally been served with process." (Citing cases.)
>
> Roberts v. Superior Court, 30 C. A. 714, 720.

Where one appears and asks some relief which can only be granted on the hypothesis that the Court has jurisdiction, it is a submission to the jurisdiction of the Court as completely as if he had been regularly served.

> Estate of Waldron, 168 Cal. 759, and cases cited.
>
> "It is to be observed in passing that a party can not be at once in Court and out of Court. He may not in the same breath dispute the merits of the cause alleged against him and deny jurisdiction of the Court over his person. * * * No words of reservation can make an appearance special which is in fact to the merits."
>
> Crawford v. Foster, 84 Fed. 939-941.

As frequently stated, the appearance and participation of plaintiff in error in the State Court, bound it and its property to the lien declared by the State Court which will be recognized by this Court of coordinate jurisdiction. The appearance was not to the jurisdiction.

THE RIGHTS OF A RECEIVER.

> "A receiver being an officer of the Court, provision will be made for his compensation. In cases where the Court has jurisdiction to make the appointment, the amount will be fixed by the Court and ordered paid out of the fund in

the receiver's hands. In the absence of statute, no definite rule governing the allowance can be laid down. Much is left to the sound discretion of the Court, and what is reasonable must be determined from a consideration of the particular circumstances of each case."

4 Pomeroy's Equity, Sec. 1659, page 3872.

The receiver is entitled to receive compensation for his services and reimbursement for his expenditures, in the first instance, from the funds which come into his possession regardless of who is ultimately successful or is ultimately liable to pay them.

Elk Fork Oil & Gas Co. v. Foster, 39 C. C. A. 615; 99 Fed. 495;

Re T. E. Hill Co., 86 C. C. A. 263; 159 Fed. 73;

Hopfensack v. Hopfensack, 61 How. Pr. 508;

Cutter v. Pollock, 4 N. D. 205; 25 L. R. A. 377; 50 Am. St. Rept. 644; 59 N. W. 1062; s. c., subseq. appeal 7 N. D. 631; 76 N. W. 235;

Espeula Land & Cattle Co. v. Bindle, 11 Tex. Civ. App. 262; 32 S. W. 582;

New Birmingham Iron & Land Co. v. Blevens, 12 Tex. Civ. App. 410; 34 S. W. 829.

A case very similar to the case at bar only the jurisdictions being reversed, is the decision in Ford v. Gilbert, 42 Or. 528; 71 Pac. 971, the decision being by Justice Bean, who afterwards was an honored Judge of the Federal Court, and who says on page 972:

"We are of the opinion, therefore, that, under such circumstances and for the purposes of this

case, the appointment cannot be regarded as void, and that the value of the petitioner's services and his expenditures, as ascertained and determined by the court appointing him, should be paid by the present receiver from the funds in his possession as if they had been incurred by himself. Where a court has no power or authority to appoint a receiver in any event, or where it has authority, but the appointment is improperly made, and subsequently set aside and vacated on motion of a nonconsenting party, it is probable that, as general rule, the receiver cannot have his compensation or expenses paid from the property, but must look to the parties to the suit. Lockhart v. Gee, 3 Tenn. Ch. 332; French v. Gifford, 31 Iowa 428; Pittsfield National Bank v. Bayne, 140 N. Y. 321; 35 N. E. 630; Weston v. Watts, 45 Hun. 219. But where the Court has the general power and authority to appoint a receiver pendente lite in proper cases, and the parties to a pending suit appear and admit that such an appointment is necessary in the suit, and, acting on such assent, a receiver is appointed, his compensation and the expenses necessarily incurred by him in preserving and caring for the property under the order of the Court should be paid out of the fund, although it may be found on further investigation and subsequent examination that the Court was in fact without jurisdiction of the subject-matter, and the suit ultimately be decided adversely to the plaintiff (Ferguson v. Dent (C. C.) 46 Fed. 88); and especially is this so where, as here, the benefit of the services of the receiver and of the expenses incurred by him has been appropriated and used by a subsequent receiver, and therefore inured to the estate."

The foregoing language is pertinent to the case at bar in that it will be recalled that the effect of the order of May 28th, 1920, which was O.K.'d and

consented to by the attorneys representing all of the parties, including the plaintiff in error, was to the effect that the receiver should hold this valuable property pending the determination of the plaintiff in error as to whether it would enter its voluntary appearance by June 10th or over a month thereafter and on or before July 6th, 1920, file its answer, complaint in intervention, or other pleading herein setting up its claim of title to the automobile tires and tubes and perforce the State Court under this order, which was assented to and requested by plaintiff in error, was compelled to and did hold the property until the filing of the complaint in the Federal Court. One of the items in the account of the receiver being for rent of premises for storage.

Plaintiff in error does not stand before this Court in an enviable or equitable light.

Plaintiff in error participated as we have repeatedly shown in the litigation and proceedings before the State Court and upon two occasions asked and received the grace and protecting arm of the Court, had its property held and preserved during pending litigation asked and received indemnifying bond and now it turns and bites the arm that protected it and asked by its complaint five thousand dollars damages against the receiver the arm of the Court and in its brief this Court is asked to reverse this case and in this Court's judgment order the District Court to award a judgment of $690.40 against the receiver, which is in law a judgment against the State Court, a Court of co-ordinate jurisdiction which Court had at all times acted in con-

formity with the requests of plaintiff in error, protected its property and awarded it upon its motion a bond of indemnity.

Perhaps it is charitable to excuse the inequitable and ungrateful position assumed by plaintiff in error as another example of a "soulless corporation".

Dated, San Francisco,
February 21, 1922.

Respectfully submitted,

EDGAR D. PEIXOTTO,
Attorney for Defendant in Error,
John M. Sullivan, as Receiver.

BRIEF FOR INTERVENOR, E. E. GERLINGER.

E. E. Gerlinger, intervenor herein and plaintiff in the action in the State Court, hereby joins in the foregoing brief and position of the receiver herein.

Intervenor's interest herein lies in the fact that he is now contingently liable on a contract of indemnity furnished the bonding company upon the execution of the bond of five thousand ($5000.00) dollars filed in the State Court to indemnify the Sterling Tire Corporation from loss incurred by reason of the receiver's possession of its property.

There is absolutely no question that the Sterling Tire Corporation submitted itself and its property to the jurisdiction of the State Court by its activities in the State Court proceedings. This submission, which was purely voluntary, subjected the property over which that jurisdiction was exercised to a lien for receiver's fees and expenses under well settled and almost elementary rules.

The property which comes into the hands of a receiver is a fund which is subject to a lien for the receiver's costs and expenses. The State Court, accordingly, subjected the property herein sought to be recovered to a lien in the sum of twenty-six hundred seventy-six and 67/100 ($2676.67) dollars and costs, etc., as by the judgment of the District Court.

Under rules of comity, which have always been recognized by this Court, the decision and judgment

of the State Court will not be disturbed nor interfered with, jurisdiction having once been properly acquired.

The inconsistency and falsity of the plaintiff in error's position herein is demonstrated by the fact that there is now in full force and effect a surety bond, constituting a valid and binding obligation of the company executing same which indemnifies and saves harmless the Sterling Tire Corporation against the very charge it herein seeks to avoid.

It is respectfully submitted that the decision of the District Court should be affirmed.

Dated, San Francisco,
February 21, 1922.

ROY A. BRONSON,
Attorney for Intervenor,
E. E. Gerlinger.